STATUTES QUOTED:

48 U.S. Code 1356 and 1402 3

7 Canal Zone Code 62 3

28 U.S. Code 1252 3

Revenue Act of 1950 Sec. 220 3

7 Canal Zone Code Sec. 23 4

48 U. S. Code 1345 4

OPINIONS

Court of Appeals Appendix A

The Hon. the Justices of the Supreme Court:

SUPREME COURT OF THE UNITED STATES

Petition for Certiorari

RAY B. WELLS, ET AL

VERSUS

UNITED STATES OF AMERICA, ET AL.

Ray B. Wells for himself and one thousand eight hundred other citizens of the United States employed by their Government in the Canal Zone, make this their petition in accordance with rule 23 of the rules of this court.

(A) Decision on appeal of the United States Court of Appeals for the Fifth Circuit holding the district Court of the Canal Zone has no jurisdiction. See appendix A as provided by subparagraph (i)

(B) This action is brought to obtain a refund of income taxes deducted from the salaries of the Plaintiff and those he represents by various agencies of the United States Government for the calendar year 1951 on the ground that such tax was illegal and unconstitucional. This court has jurisdiction to decide the question of jurisdiction of the Canal Zone Court by virtue of the provisions in Title 48, United States Code, Section 1356 and 1402, Canal Zone Code, Title 7, Section 62, Title 28 U.S. Code, section 1252.

The dates of the judgments sought to be reviewed are in Canal Zone District Court March 19, 1953, in court of appeals for Fifth Circuit, June 30, 1954.

No rehearing.

The statutory provision for review by the Supreme Court is contained in U.S. Code 48, section 1356.

(C) The sole question for review is whether by law power has been conferred on the United States District Court for the District of the Canal Zone to hear and determine a suit by United States Citizens in the Canal Zone for return of income taxes paid by them under an act of Congress. (Revenue Act of 1950, section 220).

(D) Only one statute is involved in this question of jurisdiction Title 7, section 23 of the Canal Zone Code States.

The District Court shall have jurisdiction of:

a All criminal actions wherein punishment that may be imposed exceeds a fine of $100 or thirty days imprisonment or both;

b All cases in equity;

c All cases in admiralty;

d All actions for divorce and annulment of marriage;

e All actions at law involving principal sums exceeding $500;

f All appeals from judgments rendered in the magistrates' courts;

g All actions and proceedings involving laws of the United States applicable to the Canal Zone; and

h All other matters and proceedings wherein jurisdiction is conferred by the codes of law and procedure of the Canal Zone. (U. S. Code, title 48, section 1345).

The question is did Congress confer on the Canal Zone District court power to hear an income tax case by the words:

> All actions and proceedings involving laws of the United States applicable to the Canal Zone.

On this question Report No. 535, House of Representatives, 72d Congress, First Session, February 17, 1932, Commit-

tee on Interstate and Foreign Commerce, spoke as follows:

"Existing law confers upon the district court of the Canal Zone jurisdiction of "all matters and proceedings not otherwise provided for which at the time this act took effect were within the jurisdiction of the Supreme Court of the Canal Zone, the Circuit Court of the Canal Zone, the District Court of the Canal Zone, or the judges thereof." This bill substitutes for that provision language conferring jurisdiction over *"all cases and proceedings involving laws of the United States applicable to the Canal Zone,* and all other matters and proceedings wherein jurisdiction is conferred by the codes of law and procedure of the Canal Zone." With the enactment of the proposed codes of the Canal Zone, and the amendment of the Panama Canal act as proposed in this bill, the provision of existing law just referred to will become obsolete. It is, therefore, desirable to substitute for that provision, a provision referring to the Code of Laws and procedure of the Canal Zone. It is also believed to be desirable to have the law provide specifically for jurisdiction over cases and proceedings under the laws of the United States applicable to the Canal Zone, as distinguished from purely local Canal Zone laws." (Italics ours)

(E) The statement in the decision of the Court of appeals (appendix A) is correct.

F Not applicable.

G See answer to "b" above.

H Congress is not limited by statue or precedent in

making laws for the Canal Zone. It has given the Canal Zone District Court full jurisdiction by the terms of "h" of (D) above. — "All actions and proceedings involving laws of the United States applicable to the Canal Zone."

(I) The only opinion rendered is that of the Court of Appeals (appendix A).

Premises considered your petitioners pray this Court to issue its writ to the Court of Appeals for the Fifth Circuit directing that it send case No. 14783 to the Supreme Court for review.

RAY B. WELLS *for himself and others,*

by their attorney,

JOHN O. COLLINS

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 14783

RAY B. WELLS, ET AL.,

Appellants,

versus

UNITED STATES OF AMERICA, ET AL.,

Appellees.

Appeal from the United States District Court for the Canal Zone.

(June 30, 1954.)

Before HUTCHESON, Chief Judge, RIVES, Circuit Judge, and DAWKINS, District Judge.

HUTCHESON, Chief Judge: Brought against the United States in the United States District Court for the District of the Canal Zone, by Ray B. Wells and 1500 others, citizens of the United States employed by it in the Canal Zone, the suit was to recover sums deducted as income taxes from their salaries for the calendar year 1951.

The claim stated in detail and at length in the complaint was: that the income tax under the purported authority of which the deductions were made was illegally and unconstitutionally levied; and that by virtue of the provisions expressed and implied in Sections 1346 and 1402 of Title 28, United States Code and Canal Zone Code, Sec. 23, Title 7, the District Court of the Canal Zone had authority to entertain the suit.

The United States demurred to the complaint on the ground that it had not given its permission to be sued in the District Court of the Canal Zone, and, therefore, that court was without jurisdiction to entertain the suit. The demurrer was sustained, the suit was dismissed as to the United States with prejudice to its refiling in the District Court of the Canal Zone, and plaintiffs have appealed.

Here, unable to point to any statute in which in terms the United States has expressly consented to be sued in the Distruct Court of the Canal Zone, appellants insist: that it is not essential to their claim of jurisdiction that they do so; that it is sufficient to point: to Section 23 of the Canal Zone Code, providing that the jurisdiction of the District Court of the Canal Zone extends to "all actions and proceedings involving laws of the United States applicable to the Canal Zone"; to the provisions of Secs. 1252, 1291, and 1292, Title 28 U.S.C., the first providing for a direct appeal to the Supreme Court,[1] the last two for appeals to the Courts of Appeals from

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1 "• • • from an interlocutory or finad judgment, decree, or order of any court of the United States• •the United States Court for the District of the Canal Zone• •**Holding an Act of Congress unconstitutional in any civil action suit or proceeding** in which the United States or any of its agencies or any officer or employees is a party". (emphasis supplied)

final and interlocutory orders[2] of the United States District Court for the District of the Canal Zone; and to Sections 1346(a) (1);[3] and Sec. 1402(a).[4]

So pointing, it urges upon us that when Section 1402(a) is read in connection with Section 1346, jurisdiction is implied in the Canal Zone District Court, otherwise citizens residing in the Zone would be without a remedy.

Finally, urging upon us that when all of the invoked provisions of the Canal Zone Code and of Title 28 U.S.C. are considered together, they give strong support to their contention that the District Court of the Canal Zone has jurisdiction of the suit, they conclude with this quotation from *Arthur v. Cia. General Trasatlantique,* 72 F(2) 662:

> "The District Court of the Canal Zone, in addition to the general jurisdiction given the district courts of the United States, has practically the same jurisdiction as a state court of unlimited civil jurisdiction."

The United States, in an exhaustive and excellent brief, marshaling some of the many authorities[5] uniformly support-

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[2] The Courts of Appeals shall have jurisdiction of appeals from all final and interlocutory decisions of the district courts of the United States "* *The United States District Court for the District of the Canal Zone."

[3] Providing: (a) the district courts "shall have original jurisdiction concurrent with the Court of Claims of (1) any civil action against the United States for the recovery of any internal revenue tax alleged to have been illegally or wrongfully collected under the internal revenue laws* *"

[4] Providing "any civil action against the United States under subsection (a) of Section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides."

[5] Some of which are: Compagnie Generale T. v. Governor of the Panama Canal, 90 F(2) 225, certiorari denied, 302 U.S. 720; Louisiana v. McAdoo, 230 U.S. 627; Minnesota v. U.S. 305 U.S. 382; United States v. Shaw, 309 U.S. 495; U. S. v. Sherwood, 312 U.S. 584.

ing the principle that the United States may be sued only when, as, and in, the court in which it has expressly consented to be sued, urges upon us that, absent such express consent, arguments from implications, from convenience and necessity, from considerations of reasonableness and justice, indeed arguments of any kind, except those based on pointing to an express consenting, will not do, that, indeed the very resort to them confesses away the jurisdiction contended for.

We agree that this is so and that whatever may be said for or against the persistence of the idea of the absolute immunity of the sovereign from suit except on its own terms, the fact of its persistence may not be questioned nor may its results be escaped.

Not content with this negative defense, the United States, taking the affirmative, conclusively demonstrates, we think, that by Section 1346, "United States As Defendant", under the provisions of which appellants seek to maintain their suit, the United States has consented to waive its sovereign immunity from suit and permit actions to be brought against it for the recovery of internal revenue taxes only in the Court of Claims and in the district courts; and that, as used in Title 28, the term "district courts" means only those courts which are created under Article III of the Constitution and which are constituted by Chapter 5 of Title 28.[6]

The District Court for the Canal Zone is not a constitutional court established by Chapter 5 of Title 28. Con-

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[6] Mookini v. United States, 303 U.S. 201; International Longshoremen's, Etc., Union v. Wirtz, 170 F(2) 183; Reese v. Fultz, 96 Fed. Supp. 449; 28 U.S.C., Section 451, Appendix, infra.

sequently it is not one of the "district courts" referred to in 28 U.S.C., Sec. 1346(a), and it does not acquire jurisdiction under that statute to entertain an action brought against the United States for the recovery of taxes.

The appeal is without merit. The judgment appealed from is AFFIRMED.

A True copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Fifth Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 280

RAY B. WELLS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The United States District Court for the District of the Canal Zone rendered no opinion. The opinion of the Court of Appeals (Pet. 7-11) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1954. (Pet. 7.) The petition for a writ of certiorari was filed on August 13, 1954. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether the United States District Court for the District of the Canal Zone has jurisdiction to entertain a suit against the United States for the recovery of income taxes alleged to have been erroneously or illegally assessed or collected.

STATUTES INVOLVED

The statutes involved, Canal Zone Code, Title 7, Section 23; Internal Revenue Code of 1939, Section 251; and 28 U.S.C., Sections 451, 1331, 1346, 1402, are set forth in the Appendix, *infra,* pp. 6-10.

STATEMENT

This action was brought against the United States and others in the United States District Court for the District of the Canal Zone by taxpayer Wells for himself and 1,500 others, citizens of the United States employed by it in the Canal Zone, to recover sums deducted as federal income taxes from their salaries for the calendar year 1951 (R. 1-2), on the ground that the taxes were illegally assessed and collected (R. 2-8).[1]

Jurisdiction in the United States District Court for the District of the Canal Zone is alleged in the complaint (R. 2) to be expressed and implied in 28 U.S.C., Sections 1346 and 1402, and in the Canal Zone Code, Title 7, Section 23 (Appendix, *infra,*

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[1] Taxpayers asserted in the complaint that Section 251(j) of the Internal Revenue Code of 1939 (added by Section 220 of the Revenue Act of 1950, c. 994, 64 Stat. 906, 944, Appendix *infra,* pp. 7-8), under which the tax was imposed, is "beyond the taxing power of the Congress" (R. 4).

pp. 6, 9-10). In this Court, however, taxpayers state "Only one statute is involved in this question of jurisdiction Title 7, section 23 of the Canal Zone Code * * *". (Pet. 4.)

The United States demurred to the complaint on the ground, among others, that the trial court lacked jurisdiction over the United States because the United States had not given its permission to be sued (R. 13, Pet. 8). The trial court sustained the demurrer and dismissed the complaint as to the United States (R. 15-16). The court of appeals affirmed (Pet. 7-11).

ARGUMENT

The decision of the court below holding that the trial court had no jurisdiction of a suit brought against the United States to recover a tax refund, is based upon a principle of law that is well settled by numerous decisions of this Court, and further review is not warranted.

Without specific statutory consent no suit may be brought against the United States. *Louisiana* v. *McAdoo,* 234 U. S. 627; *Minnesota* v. *United States,* 305 U. S. 382; *United States* v. *Shaw,* 309 U. S. 495; *United States* v. *Sherwood,* 312 U. S. 584; *Compagnie Generale T.* v. *Governor of the Panama Canal,* 90 F. 2d 225 (C. A. 5th), certiorari denied, 302 U. S. 720. Waivers of sovereign immunity are strictly construed (*United States* v. *Sherwood, supra,* p. 590); and it rests with Congress not only to determine whether the United States may be

sued but also in what courts. ***Minnesota*** v. *United States, supra,* p. 388. As held by the court below (Pet. 9-11), taxpayers have failed to show that Congress has ever expressed its consent to suit against the United States in the United States District Court for the District of the Canal Zone for refund of internal revenue taxes erroneously or illegally collected. Certainly, Canal Zone Code,[2] Title 7, Section 23(g), conferring jurisdiction on that court of "All actions and proceedings involving laws of the United States applicable to the Canal Zone" (Appendix, *infra,* p. 6), upon which taxpayers in this Court place sole reliance (Pet. 4), expresses no consent to suit against the United States. This subsection merely affords that court jurisdiction to decide "federal" questions, analogous to the jurisdiction granted district courts by 28 U.S.C., Section 1331. (Appendix, *infra,* pp. 8-9.)

On the other hand, in 28 U.S.C., Section 1346 (a) (Appendix, *infra,* p. 9), Congress specifically consented to jurisdiction in the district courts, concurrent with the Court of Claims, of civil actions against the United States for recovery of internal revenue taxes alleged to have been erroneously or illegally assessed or collected, and in Section 451 (Appendix, *infra,* p. 8) defined "district court" as meaning the courts constituted by chapter 5 of the same title, thus excluding the United States District Court for the District of the Canal Zone. Indeed, when Congress intended any provision of

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[2] Adopted by Act of June 19, 1934, c. 667, 48 Stat. 1122.

Title 28 to apply to that court, it is named specifically, as where, in addition to the district courts, consent is expressed to jurisdiction in the United States District Court for the District of the Canal Zone of civil actions on tort claims against the United States. Section 1346 (b). (Appendix, *infra*, pp. 9-10.) See also 28 U.S.C., Sections 460, 610, 1252, 1291, 1292, 1294.[3]

CONCLUSION

The decision of the court below is clearly correct and the petition for a writ of certiorari should be denied.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
I. HENRY KUTZ,
Special Assistants to the Attorney General.

SEPTEMBER 1954.

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[3] Taxpayers in the Canal Zone are not without recourse; they may sue the United States in the Court of Claims (28 U.S.C., Section 1491), or the Collector to whom the taxes were paid in the appropriate forum (28 U.S.C., Section 1340; *Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373).

Canal Zone Code, Title 7:

23. *Jurisdiction of district court, in general.*—The district court shall have jurisdiction of:

a. All criminal actions wherein punishment that may be imposed exceeds a fine of $100 or thirty days' imprisonment or both;

b. All cases in equity;

c. All cases in admiralty;

d. All actions for divorce and annulment of marriage;

e. All actions at law involving principal sums exceeding $500;

f. All appeals from judgments rendered in the magistrates' courts;

g. All actions and proceedings involving laws of the United States applicable to the Canal Zone; and

h. All other matters and proceedings wherein jurisdiction is conferred by the codes of law and procedure of the Canal Zone. (Aug. 24, 1912, ch. 390, sec. 8, 37 Stat. 565; Sept. 21, 1922, ch. 370, Sec. 2, 42 Stat. 1005; Feb. 16, 1933, ch. 91, sec. 2, 47 Stat. 815 [U. S. Code, title 48, sec. 1345].)

Internal Revenue Code of 1939:

SEC. 251. INCOME FROM SOURCES WITHIN POSSESSIONS OF UNITED STATES.

(a) *General Rule.*—In the case of citizens of the United States or domestic corporations,

satisfying the following conditions, gross income means only gross income from sources within the United States—

(1) If 80 per centum or more of the gross income of such citizen or domestic corporation (computed without the benefit of this section), for the three-year period immediately preceding the close of the taxable year (or for such part of such period immediately preceding the close of such taxable year as may be applicable) was derived from sources within a possession of the United States; and

(2) If, in the case of such corporation, 50 per centum or more of its gross income (computed without the benefit of this section) for such period or such part thereof was derived from the active conduct of a trade or business within a possession of the United States; or

(3) If, in the case of such citizen, 50 per centum or more of his gross income (computed without the benefit of this section) for such period or such part thereof was derived from the active conduct of a trade or business within a possession of the United States either on his own account or as an employee or agent of another.

* * * * *

(j) [as added by Sec. 220 of the Revenue Act of 1950, c. 994, 64 Stat. 906] *Employees of*

United States.—For the purposes of this section, amounts paid for services performed by a citizen of the United States as an employee of the United States or any agency thereof shall be deemed to be derived from sources within the United States.

(26 U.S.C. 1952 ed., Sec. 251.)

28 U.S.C.:

SEC. 451. *Definitions.*

As used in this title:

The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the district courts of the United States for the districts of Hawaii and Puerto Rico, the Court of Claims, the Court of Customs and Patent Appeals, the Customs Court and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.

The terms "district court" and "district court of the United States" mean the courts constituted by chapter 5 of this title.

* * * * *

SEC. 1331. *Federal question; amount in controversy.*

The district courts shall have original jurisdiction of all civil actions wherein the matter

in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

* * * * *

SEC. 1346 [as amended by the Act of April 25, 1949, c. 92, 63 Stat. 62, Sec. 2; and the Act of May 24, 1949, c. 139, 63 Stat. 89, Sec. 80]. *United States as defendant.*

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws, (i) if the claim does not exceed $10,000 or (ii) even if the claim exceeds $10,000 if the collector of internal revenue by whom such tax, penalty or sum was collected is dead or is not in office as collector of internal revenue when such action is commenced;

* * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska,

the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

SEC. 1402. *United States as defendant.*

(a) Any civil action against the United States under subsection (a) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides.

* * * * *

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